

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 76G 30152426 BY BUTTE COUNTRY ) CLUB )</b>	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On August 23, 2021, Butte Country Club (Applicant) submitted Application to Change Water Right No. 76G 30152426 to change Water Right Claim No. 76G 90656-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department held a pre-application meeting with the Applicant's consultant, Thomas Michalek of RESPEC Consulting, on June 4, 2021. Mr. Michalek submitted additional supplemental information on September 28, 2021. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated January 10, 2022. The Applicant responded with information on May 5, 2022. A request for further clarification was sent on August 11, 2022. The Applicant's Consultant responded with additional information dated August 19, 2022. The Application was determined to be correct and complete as of September 8, 2022. An Environmental Assessment for this Application was completed on December 6, 2022.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

**Application as filed:**

- Application to Change an Existing Irrigation Water Right, Form 606-IR
- Change in Place of Storage Addendum, Form 606-PSA
- Attachments
- Maps: USGS Topographic Maps showing Butte Country Club proposed place of use, post-change retired acres
  - NAIP map showing the proposed storage area in relation to Blacktail Creek
  - 1955 Water Resource Survey Map highlighting the historical place of use

#### Information Received after Application Filed

- An email dated September 28, 2021, from Thomas Michalek of RESPEC Consulting on behalf of the Applicant to the Department with additional supplemental information to add to the submitted application.
- Applicant's response to the Department's deficiency letter, dated May 5, 2022
- Response to Department's August 11, 2022, request for clarification sent from RESPEC Consulting (via email) dated August 19, 2022, with requested additional information

#### Information within the Department's Possession/Knowledge

- Pre-Application meeting checklist
- Aerial photos and topographic maps of the historical and proposed POU
- Water right records, including file for the Statement of Claim proposed to be changed
- DNRC Technical Report, dated September 8, 2022
- Montana Natural Heritage Program Wetland Guide
- StreamStats Report, dated December, 8, 2022
- Environmental Assessment dated December 6, 2022

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.

- DNRC Return Flow Memorandum, dated April 1, 2016
- DNRC Consumptive Use Methodology Memorandum, dated March 17, 2010
- DNRC Historic Diverted Volume Memorandum, dated September 13, 2012
- DNRC Consumptive Use Methodology-Turf Grass (New Projects), dated March 23, 2010

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

## **WATER RIGHT TO BE CHANGED**

### **FINDINGS OF FACT**

1. The Applicant proposes to change the points of diversion (POD) and add a place of storage (pond) to Statement of Claim No. 76G 90656-00. Claim No. 76G 90656-00 is for sprinkler irrigation of the Butte Country Club Golf Course. The pond has been in existence and this change will expand the pond slightly and bring the storage component (pond) into compliance. The place of use (POU) will change slightly as the Applicant plans to retire 3.0 acres of the historical POU to offset the capacity and evaporation of the pond. By proposing to retire 3.0 acres from the POU, the Applicant is essentially changing the place of use. The Montana Water Court Temporary Decree for Basin 76G issued on May 17, 1985, identified a sprinkler irrigation POU of 129.0 acres for Claim 76G 90656-00 in Sections 29, 32, and 33, all in Township 3 North (T3N), Range 7 West (R7W), Silver Bow County (see Table 1 below). This water right has a decreed flow rate of 600.0 gallons per minute (GPM) and a decreed volume of 374.10 acre-feet (AF). The two decreed PODs are located in the NESESW of Section 29 (POD #1), and the SESENE of Section 32 (POD #2), T3N, R7W, Silver Bow County, and consist of a pump and pipeline system from Blacktail Creek, tributary to Silver Bow Creek. The decreed period of use and period of diversion is from April 15 to October 19, annually.
2. The proposed appropriation is located within the Upper Clark Fork Basin Legislative Closure. As such, the Applicant has proposed to retire 3.0 acres of the historical POU to offset the capacity and net evaporation associated with the new place of storage (pond).
3. No supplemental rights exist, and no previous change authorizations have been authorized for this Claim.

**Table 1: WATER RIGHT PROPOSED FOR CHANGE**

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
76G 90656- 00	Irrigation	Blacktail Creek	600.0 GPM	Apr 15 – Oct 19	NESESW Sec. 29, T3N, R7W  SESENE Sec. 32, T3N, R7W	SW Sec. 29,  W2SWSE Sec. 29  NE Sec. 32  NENENW Sec. 32  SWSWNW Sec. 33  T3N, R7W	Dec 31, 1960	129.0

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

4. The historical points of diversion of Claim No. 76G 90656-00 are located in the (1) NESESW of Section 29, and the (2) SESENE of Section 32, T3N, R7W, Silver Bow County. POD #2 in the SESENE of Section 32 was retired in 1990 and consolidated with POD #1. POD #2 is no longer in use and will be removed from the water right record. The proposed POD change will move POD #1 located in the NESESW of Section 29 approximately 500 ft upstream and south/southeast of its historical location to the SESESW of Section 29, T3N, R7W. The proposed place of storage is a 1.77-AF capacity pond that will be located off Blacktail Creek in the NWSESW of Section 29, T3N, R7W, Silver Bow County.

5. The proposed POD will be gravity fed and consist of a Coanda-type screen in Blacktail Creek that will direct water to a 12" pipe leading to a sedimentation vault with a sluice flow control inlet. The vault outlet is an 18" pipe leading to a lined ditch that flows to a 24" pipe discharging to

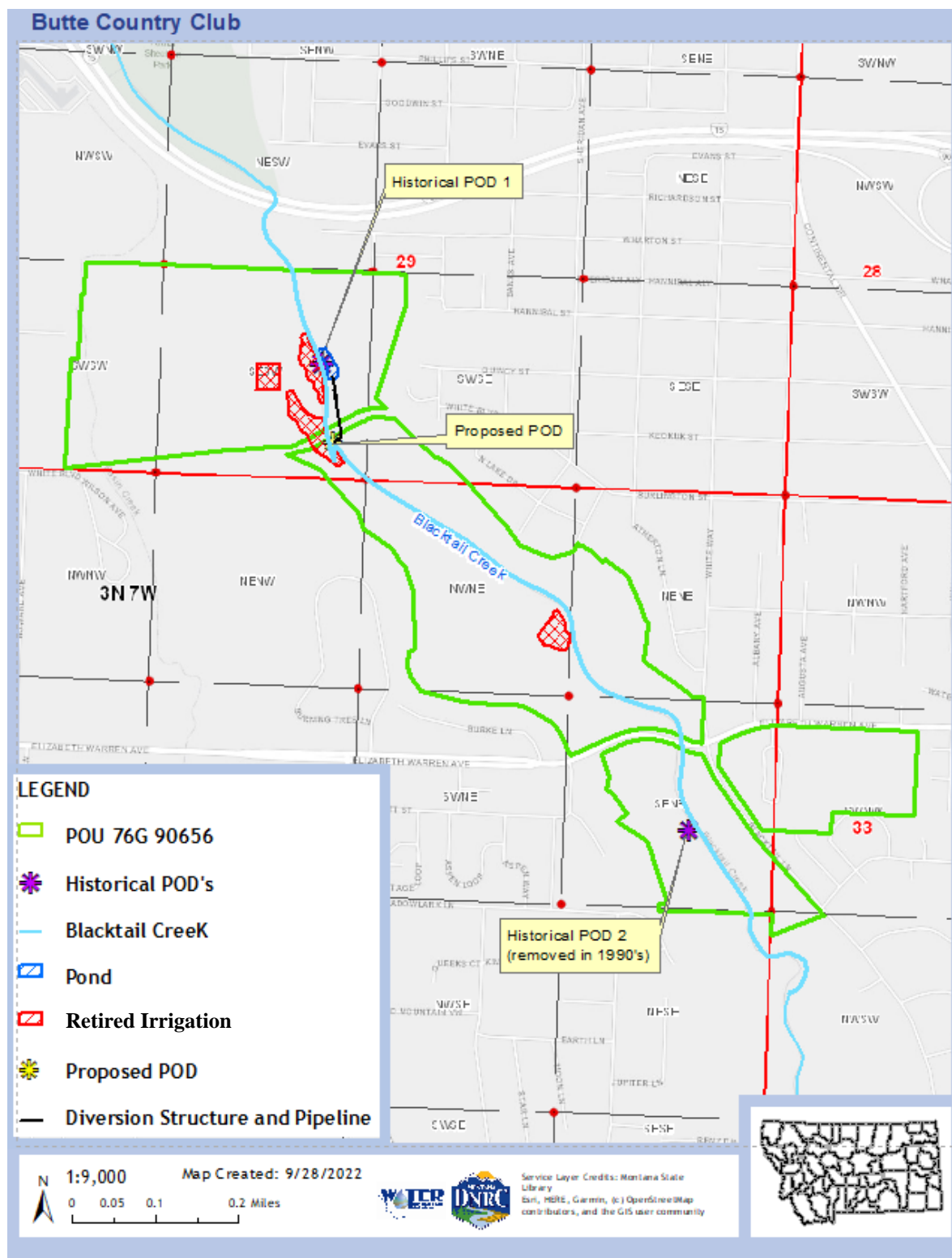
the proposed place of storage (pond). The place of storage will then utilize secondary diversions (3 pumps) to continue to irrigate 126.0 acres of the place of use (POU).

6. The historical POU will be reduced by the retirement of 3.0 acres of the 129.0 historical acres irrigated to offset the capacity and net evaporation of the pond. The retired acres are located in the SESW of Section 29 (2.2 acres), and the NWNE of Section 32 (0.80 acres), both of T3N, R7W, Silver Bow County.

7. Map 1 shows the proposed elements of this change. The Applicant will be subject to the following measurement condition under the proposed change authorization:

THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD. RECORDS OF APPROPRIATIONS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR UNTIL A PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT AND UPON REQUEST AT OTHER TIMES DURING THE YEAR THEREAFTER. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

Figure 1: MAP OF PROPOSED PROJECT AREA



## **CHANGE CRITERIA**

8. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

9. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In*

*the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).*

## **HISTORIC USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historic Use**

10. Claim No. 76G 90656-00 has a historical flow rate of 600.0 gallons per minute (GPM) and a maximum volume of 374.10 AF for the purpose of sprinkler irrigation of 129.0 acres located in Sections 29, 32, and 33, all in Township 3 North (T3N), Range 7 West (R7W), Silver Bow County. The historical points of diversion (POD) were in the (1) NESESW of Section 29, and the (2) SESENE of Section 32, T3N, R7W, Silver Bow County and consisted of pump and pipeline system in Blacktail Creek.

11. The historical period of use and period of diversion is from April 15 to October 19.

12. The Applicant states the historic method of sprinkler irrigation entailed the use of a pump and pipeline system. From the historical points of diversion located in the NESESW of Section 29, and the SESENE of Section 32, T3N, R7W, Silver Bow County, water was pumped from Blacktail Creek at the two PODs into main lines and branches to a total of 400 zones throughout the entire golf course. Seven to eight zones were typically irrigated at any given time and rotated until the full 129.0-acre POU was irrigated. Each zone contains an average of 4 sprinkler heads that can produce at an average flow rate of 20 GPM.

13. There have been no periods of non-use since this water right was first appropriated.

14. The Applicant has chosen to use the Department's standard methodologies for assessing historic consumptive use pursuant to ARM 36.12.1902. The weather station used for calculating historic consumptive use is the Butte weather station in Silver Bow County, which is the closest station in elevation to the place of use identified. The standard on-farm efficiency for a sprinkler system is 70%. On-farm efficiency refers to the percent of the water delivered to the field that is used by the crop. This estimation is based on a September 13, 2012, memo of the Department, which guided the development of standardized methodologies in determining Historic Diverted Volume. Per DNRC's methodology for calculating consumptive use for turf grass, in a memo dated March 23, 2010, and the inclusion of the county management factor, the annual irrigation requirement for the place of use is approximately 10.6 inches or 0.88 feet per irrigated acre.

Therefore, the historic crop consumptive use for the 129.0 irrigated acres is 113.5 AF (129 acres x 0.88 ft = 113.52 AF). The following table includes the variable inputs as considered in the Department's assessment of historic consumptive use. The calculations were based on a finding of 129.0 historically irrigated acres, per the Department's analysis of historical Water Resource Survey aerial photography, photo No. DFH-12-161 from 1947 and USDA photo No. 30093-278-19 from 1979.

Table 2: Historic Consumptive Volume (HCV):

County	Weather Station	IWR Turf Grass Irrigation Seasonal ET	Management Factor	Adjusted Crop Consumptive Volume after Inclusion of Management Factor	Historic Acres Irrigated	Total Calculated HCV per rule
Silver Bow	Butte	15.40 inches	68.8%	10.6 inches or 0.88 feet	129.0	113.52 AF

15. The Department calculated an additional 16.22 AF for non-crop related evaporative losses (irrecoverable evaporative losses for sprinkler irrigation are assumed to be 10% of the historic volume applied to the field).

16. The Department finds the total historic consumptive volume for this water right is 129.7 AF. See table 3 below for a breakdown of the variables considered in the Department's assessment of historic consumption.

Table 3: Historic Consumed Volume Plus Irrecoverable Losses

Silver Bow County (Butte Station) Turf Grass ET (Inches)	Silver Bow County 1964-1973 Management Factor (Percent)	Historic Acres	HCV (AF)	On-farm Efficiency (Percent)	Field Application AF	Historic Irrecoverable Losses (IL) Sprinkler 10%:	<b>HCV AF (Including IL)</b>
15.4	68.8%	129	113.52	70%	162.2	16.22	<b>129.7</b>

17. No conveyance losses are calculated due to the method of conveyance being an enclosed pipe.

18. The Department finds the total historic diverted volume for this water right is 162.2 AF. Historic diverted volume is calculated as the Field Application + Conveyance Loss = 162.2 AF + 0 = 162.2 AF.

**FINDINGS OF FACT – Adverse Effect**

19. The Applicant proposes to change the POD and add a place of storage to Statement of Claim No. 76G 90656-00. After this change POD #2 will no longer be in use and the primary point of diversion will be POD #1 located in the SESESW of Section 29, T3N, R7W. The period of diversion and period of use for irrigation of the 126-acre golf course is April 15 to October 19 of each year.

20. The proposed 1.77 AF capacity pond (0.54 surface acres x 6.5 ft maximum depth x 0.5 = 1.77 AF capacity) will be located off Blacktail Creek in the NWSESW of Section 29, T3N, R7W, Silver Bow County. The Applicant plans to retire 3.0 acres located in the SESW of Section 29 (2.2 acres), and the NWNE of Section 32 (0.8 acres), both of T3N, R7W, Silver Bow County to offset the 3.0 AF capacity of the pond (1.77 AF) & net evaporation of the pond (1.23 AF) = 3.0 AF (see Table 4 below).

**Table 4: Net Evaporation Inches**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual Total
Gross Evap*	1.39	1.55	2.29	2.91	3.88	4.76	6.15	5.99	4.51	3.31	1.96	1.30	39.98
Avg Precip**	0.59	0.52	0.8	1.08	1.91	2.3	1.26	1.15	1.1	0.8	0.62	0.58	12.71
Net Evap (Inches)	<b>0.80</b>	<b>1.03</b>	<b>1.49</b>	<b>1.83</b>	<b>1.97</b>	<b>2.46</b>	<b>4.89</b>	<b>4.84</b>	<b>3.41</b>	<b>2.51</b>	<b>1.34</b>	<b>0.72</b>	<b>27.27</b>
*Gross evaporation data from adjusted Penman-Linacre values for Butte Airport Weather Station **average precipitation measured by the Western Regional Climate Center, Butte Airport Weather Station.													

21. Per the Department's standard methodology, yearly net evaporation is 27.27 inches or 2.27 ft. Annual net evaporation from the pond is 1.23 AF in volume (0.54 surface acres x 2.27 feet per surface acre).

22. The historical POU will be reduced by the retirement of 3.0 acres within the 129-acre historically irrigated place of use to offset the capacity and net evaporation of the pond. The retired acres are located in the SESW of Section 29 (2.2 acres), and the NWNE of Section 32 (0.8 acres), both of T3N, R7W, Silver Bow County. The consumptive use plus irrecoverable losses associated with the retired acres is 3.0 AF (see Table 5 below).

Table 5: Retired Acres Historic Consumed Volume Plus Irrecoverable Losses:

Silver Bow County (Butte Station) Turf Grass ET (Inches)	Silver Bow County 1964-1973 Management Factor (Percent)	Historic Acres	HCV (AF)	On-farm Efficiency (Percent)	Field Application AF	Historic Irrecoverable Losses (IL) Sprinkler 10%:	HCV AF (Including IL)
15.4	68.8%	3.0	2.64	70%	3.8	0.38	<b>3.0</b>

23. The POU will be reduced by 3.0 acres. The 0.8 AF volume that historically returned to Blacktail creek from the irrigation of the 3.0 acres will be left instream. Loss of return flows from the retirement of 3.0 acres were erroneously left out when calculating the proposed diverted volume in the technical report dated September 8, 2022. Return flows were calculated by subtracting the field application for 3.0 acres minus the historic consumed volume including irrecoverable losses (3.8 AF applied – 3.0 AF consumed including irrecoverable losses) = 0.8 AF. The proposed diverted volume for the irrigation of 126.0 acres is 161.4 AF.

24. Water will be diverted via a Coanda-screen that will direct water to a 12" pipe and gravity fed to a sedimentation vault with a sluice flow control inlet. The vault outlet is an 18" pipe leading to a lined ditch that flows to a 24" pipe discharging to the pond. A valve will be used to limit the outflow to the ditch to no more than 600.0 GPM. To limit the flow, a mark will be placed on the valve to indicate the proper position at 0.48 ft during the active irrigation season of April 15 to October 19. The valve will be closed during the non-irrigation season, so no water enters the pond.

25. There are no intervening water rights on Blacktail Creek from the proposed POD location in the SESESW of Section 29, T3N, R7W, and the historical POD (1) located in the NESESW of Section 29 approximately 500 ft downstream and north/northwest.

26. The Applicant will subject to the following measurement condition set out in this change application:

THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD. RECORDS OF APPROPRIATIONS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR UNTIL A PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT AND UPON REQUEST AT OTHER TIMES DURING THE YEAR THEREAFTER. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

27. The Department finds there will be no adverse effects resulting from the proposed changes under the terms and conditions set out in this Preliminary Determination.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

28. The Applicant proposes to continue diverting water for the irrigation of 126.0 acres, and to add a storage component to improve management of the secondary pumps located in the pond. The pond is intended to improve management of the pump system by equalizing the hydraulic head at the pump intakes, and to prevent plugging from silting the creek. The pond is also intended to enhance aquatic habitat in Blacktail Creek and to reduce flooding issues. Irrigation is recognized as a beneficial use under § 85-2-102(2)(5), MCA.

29. The Applicant proposes to appropriate 161.4 diverted volume and 600.0 GPM to maintain a 1.77 AF capacity place of storage (pond) and irrigate 126.0 acres. The Applicant will retire 3.0-acres of the historical POU to offset capacity and net evaporation from the proposed pond. The Applicant will then utilize secondary diversions (three pumps) from the pond to continue to irrigate 126-acres of the POU from April 15 to October 19 each year.

30. The Department finds the post-change appropriation of 600 GPM up to a volume of 161.4 AF of water for irrigation to be a beneficial use of water.

## **ADEQUATE DIVERSION**

### **FINDINGS OF FACT**

31. The proposed POD change will move POD #1 located in the NESESW of Section 29 approximately 500 ft upstream to a point in the SESESW of Section 29, T3N, R7W. POD #2 is no longer in use and will be removed from this water right after this change. Relocated POD #1 will consist of a Coanda-type screen box in Blacktail Creek that will direct water to a 12" pipe that is gravity fed leading to a sedimentation vault with a sluice flow control inlet. The vault outlet is an 18" pipe leading to a lined ditch that flows to a 24" pipe discharging to the proposed place of storage. The period of diversion and period of use is April 15 to October 19 of each year.

32. The design specification of the Coanda screen is a 5.5 ft profile A0.25 screen, with a maximum capacity of 617 GPM. To limit the flow to 600 GPM, a mark on the valve will be placed to indicate the proper position at 0.48 ft during active irrigation.

33. The three secondary diversion pumps in the pond will be adjusted to match the inflow rate of 600 GPM to maintain a constant water level in the pond. The place of storage will utilize these secondary diversions to irrigate the 126.0-acre place of use. Outside of the irrigation season the inlet will be closed to not allow water to enter the pond.

34. Based on the proposed diversionary system specifications and additional information provided in the Application, the Department finds that the proposed irrigation system and storage infrastructure are adequate to accommodate the proposed POD change with a maximum diversion of 161.4 AF at a flow rate of 600 GPM from April 15 to October 19 each year.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

35. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

## **CONCLUSIONS OF LAW**

### **HISTORIC USE AND ADVERSE EFFECT**

36. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

37. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for

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<sup>1</sup> DNRC decisions are available at:  
[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

38. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana

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<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

<sup>3</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

39. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909);

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<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41l 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

40. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

41. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern

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<sup>5</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31, 43, 198 P.3d 219, ¶¶ 22, 31, 43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

42. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

43. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972

Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

44. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

45. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

46. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No.14).

47. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988) (historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

48. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76G 90656-00 of 162.2 AF diverted volume and 600.0 GPM flow rate with a consumptive use of 129.7 AF. (FOF Nos. 10-18)

49. Based upon the Applicant’s comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF Nos. 19-27)

### BENEFICIAL USE

50. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. A.R.M. 36.12.1801. The amount of water that may be authorized for change is

limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

51. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that 161.4 AF of diverted volume, and 600.0 GPM flow rate of water requested is the amount needed to sustain the beneficial use. § 85-2-402(2)(c), MCA (FOF Nos. 28-30)

#### ADEQUATE MEANS OF DIVERSION

52. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6<sup>th</sup> Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

53. Pursuant to § 85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 31-34)

#### POSSESSORY INTEREST

54. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

55. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 35)

#### PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76G 30152426 should be **granted**.

The Department authorizes the Applicant to add a place of storage and change the historical PODs located on Blacktail Creek. After this change POD #2 will no longer be in use and POD #1 will be relocated from its historical location in the SESENE of Section 32 to a point approximately 500 feet upstream in the SESESW of Section 29, T3N R7W, Silver Bow County. The 1.77 AF capacity place of storage (pond) will be located off Blacktail Creek in the NWSESW of Section 29, T3N, R7W, Silver Bow County.

The Department authorizes the Applicant to use 161.4 AF diverted volume at a flow rate of 600.0 GPM from Blacktail Creek to fill and maintain their 1.77 AF capacity place of storage and to irrigate 126.0 acres of the historical POU from April 15 to October 19 of each year.

The Applicant will be subject to the following measurement condition under Change Authorization No. 76G 30152426:

THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD. RECORDS OF APPROPRIATIONS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR UNTIL A

PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT AND UPON REQUEST AT OTHER TIMES DURING THE YEAR THEREAFTER. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

DATED this \_\_\_\_ day of \_\_\_\_\_ 2022.

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Jennifer Daly, Regional Manager  
Helena Regional Office  
Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this \_\_\_\_ day of \_\_\_\_\_ 20\_\_, by first class United States mail.

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